SUBJECT INDEX.

Petition for Certiorari.

Supporting Brief on Petition for Certiorari.

In The

SUPREME COURT OF THE UNITED STATES

October, 1947, Term.

No. .....

GEORGE M. ILLGES and LOUISE HAMM, Administratrix of the Estate of John Hamm, Deceased,

Petitioners,

vs.

J. E. CONGDON, Jr.,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Walworth County, Wisconsin.

To the Honorable, the Supreme Court of the United States:

George M. Illges and Louise Hamm, Administratrix of the Estate of John Hamm, Deceased, in support of this, their petition for a writ of certiorari to be directed to the Circuit Court for Walworth County, Wisconsin, to review a decree of judgment entered on the 3rd day of November, 1947, and which became final on the 14th day of November, 1947, pursuant to opinion and mandate of the Supreme Court of the State of Wisconsin filed on the 10th day of June, 1947, respectfully show:

I.

A summary statement of the matter involved.

1.

That in July, 1943, George M. Illges instituted an action at law for damages for breach of contract by service of summons and complaint; that said action was instituted in the Circuit Court for Walworth County, Wisconsin; that thereafter, the defendant, J. E. Congdon, Jr., appeared and on proceedings duly had secured an order interpleading John Hamm as an interpleaded defendant; that said John Hamm appeared and cross-complained against the defendant, J. E. Congdon, Jr., for damages for breach of contract; that the defendant, respondent above named, cross-complained for damages for breach of contract against the interpleaded defendant; that the parties to said action submitted the issues of fact and law to the court without a jury, whereupon the Honorable Arthur W. Kopp, Circuit Judge, was called to hear and determine said case.

2.

That said action proceeded to trial upon the issues of fact made by the testimony and the evidence, after which trial, the trial judge by written opinion decided that the petitioners and the respondent entered into a contract about the 27th day of December, 1941, for the manufacture of timber into lumber pursuant to the terms of which petitioner, Hamm's predecessor in title was to move his sawmill onto the premises and be responsible for the logging, sawing, and piling of the product; petitioner, Illges, was to sell the product, and respondent, Congdon, was to

furnish the timber. From the proceeds of sales were to be paid:

a. To petitioner, Illges, any expense other than the selling and cost of production;

b. To respondent, Congdon, fifteen (15) dollars per thousand board feet for timber;

c. To petitioners, thirty (30) dollars per thousand board feet for converting the timber into lumber products and disposing of the same.

The profits above forty-five (45) dollars per thousand sales' price were to be divided three ways. The contract was to embrace five hundred thousand (500,000) feet log scale of timber and was to be performed within a five (5) year period.

The respondent, Congdon, stopped the enterprise and refused to permit the other parties to perform claiming that they had breached the same by reason of their refusal to permit him to have lumber sawed by the joint enterprise at eighteen (18) dollars per thousand. The trial court determined that the contract did not permit respondent to have lumber at eighteen (18) dollars per thousand, or at any other price from the production of the joint enterprise and that his refusal to permit the other parties to perform the contract constituted a breach thereof. The court further determined that petitioners had done everything within their power to carry out the contract in good faith and that respondent, Congdon, was guilty of a breach.

That after the decision of the trial court, respondent moved for a rehearing, and upon said rehearing a supplemental opinion was filed holding that the offer of petitioners to withdraw from the contract upon certain minimum conditions was not an indication of a desire of petition-

ers to get out of their contract by an offer to compromise the situation and avoid litigation.

Thereafter, the trial court made findings of fact and conclusions of law specifically finding and determining that respondent was not justified in terminating the joint venture; that petitioners had done everything within their power to carry out the contract in good faith; that respondent had no substantial cause for complaint as to the performance by petitioners; that respondent had not been damaged in any manner at the time he stopped work on the contract; that none of the reasons assigned by the respondent in justification of his termination of the contract went to the heart of the contract or constituted a material breach thereof by petitioners; that respondent wrongfully terminated the contract and prohibited further performance when only about one-tenth of the logs agreed upon had been cut.

And as conclusions of law, the trial court specifically determined that responodent wrongfully breached the contract and terminated the joint enterprise; that neither of petitioners breached the contract; that petitioners were entitled to damages in addition to cost of production each in the sum of three thousand nine hundred ninety-three and 66/100 (3,993.66) dollars, amounting in all to the sum of seven thousand nine hundred eighty-seven and 32/100 (7,987.32) dollars as damages.

Judgment upon the findings of fact and conclusions of law was entered on the 20th day of February 1945.

That respondent appealed to the Supreme Court of the State of Wisconsin from the whole of said judgment on the 27th day of March, 1945.

3.

That on said appeal the Supreme Court of the State of Wisconsin by written decision filed on the 4th day of December, 1945, and printed in 248 Wis. Reports 85 found that petitioners had breached the contract entered into by the parties in that they had attempted to enforce a new and different contract and that said attempt on behalf of petitioners was not an inadvertent failure to perform an existing contract but an attempt to enforce the terms of a new contract which had never been agreed upon. By mandate, the Supreme Court directed:

> "Judgment reversed and cause remanded for further proceedings in accordance with this opinion, appellant to have full costs."

Thereafter, petitioners moved for a rehearing and upon said rehearing, the Supreme Court by mandate directed:

> "The only questions left to be determined are what damages, if any, Congdon suffered by reason of the breach of the contract on the part of Illges and Hamm and the rights of the parties in the remaining assets of the joint enterprise in accordance with the terms of the contract which the court found had been entered into."

4.

Thereafter, said record was remanded to the trial court, and further proceedings thereon duly had. Petitioners duly moved the court for leave to offer additional evidence on the one issue as to whether or not they were attempting to enforce performance of a new and different contract at any time prior to the termination of the contract by respondent; that said motion was denied by the trial court.

That thereupon, the trial court conducted the additional proceedings for the purpose of determining the status and disposition of the timber and lumber on hand up to the date of the hearing, and by written decision, the Supreme Court had by its decision nullified certain findings of fact and concluded that the opposite of each of said findings of fact should have been made.

That, thereafter the trial court made additional findings of fact and conclusions of law dated on the 11th day of September, 1946, by which it determined that the Supreme Court had nullified findings of fact 10, 18, 19, 21, and 22, and had found as follows:

"And the Supreme Court having nullified findings of fact numbers 10, 18, 19, 21, and 22, and having found in effect:

1. In lieu of finding number 10, that the defendant, J. E. Congdon, was justified in terminating the joint venture.

2. In lieu of finding number 18, that the plaintiff and interpleaded defendant have not done everything within their power to carry out the contract in good faith in that they attempted to enforce performance under a new contract not found by the court or entered into by the parties.

3. In lieu of finding number 19 that defendant had substantial cause for complaint as to the performance by the plaintiff and the interpleaded defendant.

4. In lieu of finding number 21 that the attempt of the plaintiff and interpleaded defendant to enforce performance under a contract not agreed upon by the parties went to the heart of the contract and con-

stituted a material breach thereof by the plaintiff and the interpleaded defendant.

5. In lieu of finding number 22, that defendant, J. E. Congdon, did not unreasonably terminate the contract."

That thereafter, judgment was entered in accordance with the mandate of the Supreme Court, and further denying petitioners' right to offer additional evidence.

That thereafter, and on the 12th day of October, 1946, respondent again appealed to the Supreme Court of the State of Wisconsin from the whole of said judgment excepting the portion thereof directing sale of the lumber and material on hand.

4.

That thereafter, and on the 19th day of November, 1946, petitioners instituted mandamus proceedings before the Supreme Court of the State of Wisconsin and secured an order requiring respondent to show cause why an original action should not be instituted in Supreme Court by mandamus for the purpose of construing the construction placed upon the decision and mandate of the Supreme Court filed on the 4th day of December, 1945, and appearing in 248 Wis. 85; that said mandamus was issued, the action authorized, and the court considered the matter on the moving papers, pleadings, and briefs of counsel; that in said proceeding petitioners alleged that notwithstanding the objection of petitioners, the lower court entered judgment on the 5th of October, 1946, denying petitioners' motion for opportunity to offer additional evidence on the one issue as to whether or not petitioners were attempting to enforce performance of a new and different contract at any time prior to the termination of the contract by re-

spondent, Congdon, and further that the Supreme Court of the State of Wisconsin was without power to make findings of fact; that the Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of life, liberty or property without due process of law; that it was the duty of the trial court to construe the mandate of the Supreme Court of December 4, 1945, so as to permit the entry of a valid judgment supported by findings of fact of the trial court; that no trial was had or evidence introduced before the trial court authorizing or permitting a finding that petitioners had at any time attempted to enforce performance under a contract not agreed upon.

That there is no finding by the trial court:

a. That petitioners sought to enforce a new contract not found by the trial court prior to the termination of the contract by the respondent, Congdon;

b. That there is no finding by the trial court that petitioners would not proceed under the terms of the contract found by the trial court;

c. That the trial court *did* find that the petitioners would not proceed under the contract as it was claimed to exist by the defendant, Congdon, and permit the defendant to take lumber from the pile at eighteen (18) dollars per thousand or at any other price, or to furnish the defendant knotty pine;

That as a result of the interpretation by the trial court of the opinion and mandate of the Supreme Court filed on the 4th day of Decem[illegible], 1945, petitioners have had property taken from th[illegible]out due process of law, and the judgment entered om[illegible]nages found by the trial court to have been sustained by them as a result of a breach of the contract by the respondent, Congdon.

That by opinion filed on the 25th day of February, 1947, the Supreme Court decided that the trial court had properly construed the mandate and opinion of the Supreme Court as filed on the 4th day of December, 1945, and further decided as follows:

> "The relator argues in support of his contention that the judgment entered by the trial court was not in conformity with the mandate, that this court in considering the evidence upon the appeal in the case of Illges vs. Congdon, supra, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that this court is without power to make findings of fact. This contention cannot be sustained and raises no question either under the Constitution of the State of Wisconsin, or the Constitution of the United States."

5.

That thereafter, by opinion filed in the Supreme Court on the 10th day of June, 1947, on the second appeal taken by respondent to the Supreme Court aforesaid, it determined that the mandate of the Supreme Court in the first appeal filed on December 4, 1945, appearing at 248 Wis. 85 was in error by reason of the fact that respondent terminated the contract and lost any right to sue for damages, and that his sole remedy was restitutionary; that on petitioners' motion for review of said judgment, judgment was modified by requiring respondent to pay sixty-seven and 80/100 (67.80) dollars per thousand for the nine thousand (9,000) feet of lumber taken by him during the time the enterprise was operating in lieu of twenty-one

(21) dollars per thousand fixed by the trial court; that the mandate of the court was:

> "The judgment is modified as stated in the opinion and affirmed as so modified."

6.

That thereafter, after the remand of the record to the trial court, petitioners moved for modifications in the findings of fact and conclusions of law. Respondent likewise moved for modifications of the findings of fact and conclusions of law, and on proceedings thereafter had in the trial court, an order amending and modifying the findings of fact and conclusions of law and judgment was entered by the court after hearings duly had on the 3rd day of November, 1947, and the final judgment was made absolute by order of the court authorizing execution dated and entered November 14, 1947.

7.

That your petitioners respectfully contend that the Supreme Court of the State of Wisconsin is without power to make findings of fact; that the findings of fact of the trial court are sustained by the evidence; that the findings of fact made by the Supreme Court are without support in the evidence; that judgment in favor of the petitioners and against respondent in the trial court was reversed upon findings of fact made by the Supreme Court beyond and in excess of its power; that petitioners have had property rights taken from them without due process of law.

8.

That your petitioner, George M. Illges, is a citizen of the United States of America and of the State of Wisconsin, and resides in the Town of Salem, Kenosha County, Wisconsin; that your petitioner, Louise Hamm, administratrix of the Estate of John Hamm, Deceased, is a citizen of the United States of America and of the State of Wisconsin, and resides in the City of Burlington, Racine County, Wisconsin; that John Hamm, now deceased, during his lifetime was a citizen of the United States of America and of the State of Wisconsin residing in the City of Burlington, Racine County, Wisconsin; that each of the petitioners is entitled to the rights, privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

II.

Statement as to jurisdiction.

The jurisdiction of this court stems from the general power conferred by Judicial Code, Section 237, 28 U. S. C. A. 344, Subsection b. Petitioners have complied with Title 28, Sec. 350 as to applying for the writ within three (3) months from the date when the judgment sought to be reviewed became final. The judgment did not become final until the modifications of the judgment entered on the 7th day of October, 1946, had been completed. On the 2nd day of February, the time for filing petition and supporting briefs was extended to the 4th day of March, 1948, by Mr. Justice Murphy of this court.

III.

Question involved.

The question is: Does a judgment entered pursuant to mandate of a court of last resort containing findings of fact made by the court of last resort beyond and in excess of its power and not supported by the evidence denying petitioners' damage for breach of contract take property of petitioners without due process of law?

IV.

Reasons relied upon for allowance of writ of certiorari.

Petitioners rely upon the following reasons for the allowance of the writ of certiorari in the Supreme Court of the United States:

The findings of fact of the trial court are supported by the clear weight and great preponderance of the evidence.

The finding of the Supreme Court of the State of Wisconsin, to-wit: That petitioners had breached the contract by attempting to force performance by respondent of a contract not agreed upon, is without any support in the record and beyond and in excess of the power of the Supreme Court.

Judgment was entered in the trial court in favor of petitioners for damages for breach of contract in the sum of three thousand nine hundred ninety-three and 66/100 (3,993.66) dollars each, or in the joint amount of seven thousand nine hundred eighty-seven and 32/100 (7,987.32) dollars.

The final judgment denying damages to petitioners is not supported by findings of fact of the trial court and is supported only by findings of fact of the Supreme Court made beyond and in excess of its power.

The Supreme Court of the State of Wisconsin derives its power from Article 7, Sec. 3, Wisconsin Constitution. By Chapter 242 of the Laws of 1893, the legislature of Wisconsin sought to impose upon the Supreme Court the right to give judgment according to the right of cause regardless of the decision upon questions of fact and law made by the trial court. This enactment was declared unconstitutional by the Supreme Court in *Klein vs. Valerius,* 87 Wis. 54. In *Deery vs. McClintock,* 31 Wis. 195, the Supreme Court recognized its own limitation of power and the absence of power in the legislature to add to or detract from the power, and held that the legislature was without power to withdraw appellate jurisdiction and likewise without power to grant to the Supreme Court original power to make findings of fact.

A judgment has accordingly been entered denying petitioners right to a judgment based upon findings of fact in accordance with the findings of fact of the trial court, which denial is based upon findings of fact made by the Supreme Court beyond and in excess of its power, without support in the pleadings or evidence, contrary to undisputed facts, and in violation of settled principles of law.

Therefore, petitioners have had property taken from them without due process of law.

Wherefore, your petitioners pray that a writ of certiorari may issue to the Circuit Court of Walworth County commanding it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be reviewed and determined by this

Honorable Court and for all other relief as may be proper.

Respectfully submitted,

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

..... J. Arthur Moran .....

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,

606 56th Street, Kenosha, Wisconsin.

Specifications of Errors.

1.

The State Supreme Court erroneously made findings of fact beyond and in excess of its power.

2.

The State Supreme Court erroneously nullified the findings of fact of the trial court supported by ample evidence and substituted in place of the findings of fact findings not supported by any evidence.

3.

That the State Supreme Court erroneously directed the vacation of the judgment in favor of petitioners and against respondent for damages.

4.

That the State Supreme Court erroneously directed the entry of the judgment omitting judgment in favor of petitioners and against respondent for damages for breach of contract.

Summary of Points of Argument.

1.

The Wisconsin Supreme Court is without power to make findings of fact.

2.

The judgment finally entered denying petitioners damages is supported only by findings of fact made by the Supreme Court of Wisconsin and not by any finding of the trial court.

3.

The judgment denies property rights of petitioners in contravention of the Fourteenth Amendment to the Constitution of the United States.

4.

The judgment of the Supreme Court is open to review.

5.

A substantial federal question is presented by the record for review on certiorari.

6.

The judgment here complained of did not become final until the 14th day of November, 1947.

7.

The writ of certiorari should properly be directed to the Circuit Court for Walworth County, Wisconsin, the court possessed of the record.

AUTHORITIES.

Authorities Cited—*Continued.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO REVIEW STATE COURT JUDGMENT.

1.

The Supreme Court of the State of Wisconsin is without power to make findings of fact.

The power of the Supreme Court of the State of Wisconsin is created and circumscribed by Article 7, Section 3, Wisconsin Constitution granting to it appellate jurisdiction only so far as here material.

The State Supreme Court has always recognized its own limitation in power. By Chapter 242 of the Laws of 1893, the legislature sought to impose and grant to the Supreme Court responsibility and power to direct entry of judgment irrespective of findings of fact of the lower court. The enactment so far as here material provided:

> "All questions of law or fact presented by the record upon such appeal or writ of error, shall be reviewed by the supreme court, and it shall be the duty of the supreme court to examine and review the evidence when the same is preserved by a bill of exceptions, and give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below, according to law and equity."

This enactment was declared void under the Constitution of the state at the first term of court following the enactment quoted, *Klein vs. Valerius,* 87 Wis. 54. The quoted enactment of the legislature became effective April 28, 1893. The cited case declaring the law void was de-

cided January 30, 1894. In *Deery vs. McClintock*, 31 Wis. 195, the court expressly held that the legislature could not take original jurisdiction from the Circuit Courts and bestow it upon the Supreme Court.

The rule is distinctly stated at 5 *C. J. S.* p. 1318, Sec. 1845:

> "Outside of constitutional or statutory requirement * * * an appellate court is generally not only not required to make findings of fact but is without power to do so especially in an action at law."

The last recognition of the principle here involved that we have been able to find is in *Nickel vs. Black*, 248 Wis. 122.

It is and has always been the rule in Wisconsin that the findings of a trial court in an action at law where a jury is waived have the same force and effect as a verdict.

Evans vs. Bennett, 7 Wis. 404;
Sippel vs. Fond du Lac County, 184 Wis. 607;
Angers vs. Sabatinelli, 246 Wis. 374;
Nickel vs. Black, 248 Wis. 122.

The trial court construed the mandate and opinion of the State Supreme Court at 248 Wis. 85 to make findings of fact contrary to the findings of fact made by the trial court upon the evidence, R. 965-975. (See opinion of trial court of 955-964) Petitioners contended that it was the duty of the trial court to construe the opinion and mandate of the Supreme Court as declarations of law applicable to assumed facts and not as findings of fact made by the Supreme Court binding upon it. The State Supreme Court approved the construction placed upon its decision and specifically rejected the claim that the effect of the findings of fact made by it was to deprive petitioners of property

rights in contravention to the due process clause of the Fourteenth Amendment to the Constitution of the United States, *250 Wis. 32.*

No question of law was presented wiith respect to the finding. It is now and always has been the law in Wisconsin under the constitutional powers of the State Supreme Court that whether or not an inference or finding *can be* made from given facts is a question of law, but whether an inference or a finding *shall be* made from given facts is a question of fact within the sole and exclusive province of the trial court.

Borchert vs. Borchert, 141 Wis. 142;
Morris F. Fox & Co. vs. Lisman, 208 Wis. 1;
Will of Mechler, 246 Wis. 45;
Nickel vs. Black, 248 Wis. 122.

Upon the trial of the case, no evidence was offered or received from which it could be said that petitioners had breached the contract by attempting to force performance under terms and conditions not agreed upon. On the other hand, the only evidence on the subject was elicited on cross examination of petitioner, George M. Illges, R. 836, 837, Exhibit "47", question by attorney for respondent to petitioner, George M. Illges:

"Q. You may refer, Mr. Illges, to Exhibit '47' (handing to the witness). When you wrote that letter of September 25, 1942, to Dr. Congdon was it your understanding that in that letter you were stating the terms and conditions of a new agreement pursuant to which you would proceed to the cutting of additional lumber at Ayer Park?

"A. No, sir, no new agreement. To try to finish up and receive money on products produced which I had sold; to load cross ties which I had sold; to finish milling and loading the crossing plank which

I had sold and convert it to money. He had stopped the operation and this was only to complete that order at that time."

The judgment originally entered in favor of petitioners included damages for breach of contract in the amount of seven thousand nine hundred eighty-seven and 32/100 (7,987.32) dollars, R. 136-138. This judgment was nullified by findings of fact made by the Supreme Court in excess of its power and without support in the record.

2.

The judgment finally entered denying petitioners' damages is supported only by findings of fact made by the Supreme Court of Wisconsin and not by any finding of the trial court.

The trial court by decision found that respondent breached the contract by prohibiting further performance by the other parties, R. 107-8-9. (Original decision of trial court.)

By supplemental decision the trial court found that the offer of petitioners to withdraw upon certain minimum conditions did not indicate a desire of petitioners to get out of the contract but an offer to compromise the situation and avoid litigation, R. 123-4.

The trial court by findings of fact found that respondent was not justified in terminating the joint venture, R. 129; that petitioners had done everything within their power to carry out the contract in good faith; that respondent had no substantial cause for complaint; that respondent had not been damaged in any manner; that none of the reasons assigned by respondent, as justification for his termination of the contract, went to the heart of the contract or constituted material breaches by either of

the petitioners. That respondent wrongfully terminated the contract, R. 130.

The findings of fact prepared by the trial judge after remand of the record from the Supreme Court do not incorporate the findings made by the Supreme Court, R. 127-135.

The judgment entered on the 7th of October, 1946, omits damages in favor of petitioners for breach of contract, R. 136-139.

The judgment finally became absolute after the second appeal by respondent to the State Supreme Court, R. 1053-1060, and omitted damages in favor of petitioners for breach of contract, R. 999-1010, judgment of October 7, 1946, R. 1203-1210, order amending judgment, November 3, 1947. (Order directing disbursement and permitting issuance of execution of November 14, 1947, R. 1211-1213.)

3.

The judgment denies property rights of petitioners in contravention of the Fourteenth Amendment to the Constitution of the United States.

Rights acquired by judgment are protected by the due process clause of the Fourteenth Amendment. 16 *C. J. S.* p. 1195, Sec. 599; *Collins vs. Welsh,* 75 F. (2d) 894, 295 U. S. 762, 79 Lawyers' Ed. 1704.

Both of the petitioners are citizens of the United States and entitled to the privileges and protections of the Fourteenth Amendment to the Constitution.

Hill vs. Bugbee, 250 U. S. 525, 63 Lawyers' Ed. 1124.

4.

The judgment of the State Court is open to review.

The rule that the decisions of a State Court on questions of fact ordinarily cannot be made the subject of inquiry in the United States Supreme Court is subject to two exceptions:

First, when a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it; and

Second, where conclusions of law as to Federal rights and findings of fact are so intermingled as to make it necessary to review the facts in order to pass on the Federal question.

Northern Pacific Rwy. Co. vs. State of North Dakota, 236 U. S. 585, 59 Lawyers' Ed. 735;

Truax vs. Corrigan, 257 U. S. 312; 66 Lawyer's Ed. 254;

Fiske vs. State of Kansas, 274 U. S. 380, 71 Lawyers' Ed. 1108;

Great Northern Rwy. Co. vs. State of Washington, 300 U. S. 154, 81 Lawyers' Ed. 573;

City of Shreveport vs. Cole, 129 U. S. 39, 32 Lawyers' Ed. 589;

Chicago B & Q Rwy. Co. vs. City of Chicago, 166 U. S. 226, 41 Lawyers' Ed. 979;

Oxley vs. County of Butler, 166 U. S. 648, 41 Lawyers' Ed. 1149.

5.

A substantial Federal question is presented by the record for review on certiorari.

After remand of the record after the decision and mandate of the Supreme Court of Wisconsin appearing at 248 Wis. 85, petitioners sought the right to offer additional evidence on the one issue created by the finding of the Supreme Court as to whether or not petitioners had ever sought to enforce a new contract or refuse performance of the contract found by the trial court. This application was denied, paragraph 4 judgment entered October 7, 1946, R. 1002.

Petitioners sought review of the construction of the trial court of the decision and mandate of the Supreme Court, which construction was affirmed on mandamus, 250 Wis. 32.

On the second appeal to the State Supreme Court, petitioners moved to review the judgment upon the ground that judgment erroneously fails to award damages to respondent for breaches of contract by the parties prior to the termination of performance thereof by Congdon and upon the ground that the judgment erroneously fails to include damages sustained by petitioners by reason of the breach of the contract by respondent, R. 1194-1202. These rights were denied, 251 Wis. 50, and the State Supreme Court erroneously concluded that neither party was entitled to any damages, affirmed the appeal on respondent's appeal, and modified the judgment on petitioners' motion for review, 251 Wis. 50. The record was thereafter remanded to the Circuit Court for modification of the findings and amendment of the judgment.

This court has repeatedly held that a claim that a state has in violation of the Federal Constitution deprived

petitioner of property without due process of law raises a substantial Federal question for review.

Postal Telegraph Co. vs. City of Newport, 247 U. S. 464, 62 Lawyers' Ed. 1215;

Home Ins. Co. vs. Dick, 281 U. S. 406, 74 Lawyers' Ed. 926;

Miller vs. Schoene, 276 U. S. 272, 72 Lawyers' Ed. 568;

Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 U. S. 673, 74 Lawyers' Ed. 1107;

36 *C. J. S.* 157, Sec. 247;

25 *C. J.* 934, Sec. 286.

A substantial Federal question is raised where substantial rights protected by Constitution are denied irrespective of whether these rights were denied by the legislative, executive, or judicial branch of the state government.

Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 U. S. 673 at 682, 74 Lawyers' Ed. 1107 at 1114.

6.

The judgment here complained of did not become final until the judgment which was entered October 7, 1946, (R. 1009), had been modified by the order entered November 3, 1947, and became subject to execution by order made and entered November 14, 1947.

A judgment or decree which terminates the remedies between the parties on the merits and is subject to execution is final.

Whiting vs. The Bank of of the U. S., 13 Pet. 6, 10, Lawyers' Ed. 33;

Market St. Rwy. Co. vs. Railroad Comm. of California, 324 U. S. 548, 89 Lawyers' Ed. 1171;
McComb vs. Knox County, 91 U. S. 1, 23 Lawyers' Ed. 185;
62 *L. R. A.* 515, et seq.

A judgment which is reversed and remanded for further proceedings is not a final judgment for purposes of review in the United States Supreme Court.

Central New England Rwy. Co., 279 U. S. 415, 73 Lawyer's Ed. 770;
Morgan vs. Thompson, 124 F. 203.

A judgment of affirmance and remanding the case does not result in a final judgment until the modifications directed have been made.

Reddall vs. Bryan, 65 U. S. 420, 16 Lawyers' Ed. 740;
Coe vs. Armour Fertilizer Works, 237 U. S. 413, 59 Lawyers' Ed. 1027.

See:

87 Lawyers' Ed., p. 264 note.

It is the general rule that where a judgment is amended or modified, the time within which an appeal from such determination may be taken runs from the date of the amendment or modification and not from the date of the original entry. 80 Lawyers Ed. p. 1121 note.

In *Department of Banking vs. Pink,* 317 U. S. 264, 87 Lawyers' Ed. 254, a judgment affirmed by the New York Court of Appeals was a final judgment so far as determining the time from which the three months' period for appeal or certiorari is concerned because nothing remained undone or to be undone. The amendment sought by petitioners merely seeking to have the remitter amended to show that a Federal question had been determined did not

have the effect of a modification of the judgment so as to extend the time from which the three months' period for appeal or certiorari was to be computed to the date of the amendment. The judgment here under consideration did not become final and reviewable until it ended the litigation by fully determining the rights of the parties. On the first appeal to the State Supreme Court the mandate of the court reversed and remanded the case for further proceedings to determine the rights of the parties. The second appeal modified the judgment and required substantial reconsideration and modifications to the findings of fact, conclusions of law and judgment previously entered. These modifications were not of a ministerial nature. The rights of the parties to the assets of the joint enterprise had not been determined finally and completely pursuant to the mandate of the court from the first appeal. In lieu of nominal damages allowed to the respondent in the judgment as entered, no damages were allowed in the final judgment. After sale of the assets, the court reserved the right and power on motion to determine the several amounts due the several parties. In the order amending the judgment dated November 3, 1947, R. 1210, the court expressly reserved and precluded the issuance of execution until the further order of the court. These functions are judicial in nature requring judicial discretion, judgment and power and not ministerial acts of a purely clerical nature.

Conclusion.

Petitioners respectfully submit that this petition for certiorari should be granted. Petitioners' right to property is involved. The Fourteenth Amendment to the Constitution of the United States prohibits a state acting

through its legislative, executive, or judicial branch from depriving them of property without due process of law. Petitioners' right to the judgment for damages has been deprived solely by an act of the State Supreme Court in making a finding of fact beyond and in excess of its power, which finding is not supported by any evidence in the case and which finding is in fact diametrically opposed to the findings of the trial court made after a thorough analysis of all of the evidence and observations of the witnesses who testified upon the trial. The right involved has been consistently and repeatedly urged upon not only the trial court but the Supreme Court at the first opportunity. The trial court felt obliged to enter the judgment directed by the Supreme Court. The trial court construed the opinion and mandate of the Supreme Court as making findings of fact, and the Supreme Court affirmed the construction placed upon its opinion and mandate by the trial court and directed the entry of judgment here complained of.

We respectfully submit that writ of certiorari issue to the Circuit Court for Walworth County, Wisconsin.

Respectfully submitted,

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,

606 56th Street, Kenosha, Wisconsin.

MOTION OF PETITIONERS TO DISPENSE WITH PRINTING RECORD OR IN THE ALTERNATIVE TO LIMIT PARTS OF THE RECORD TO BE PRINTED.

The petitioners, George M. Illges, and Louise Hamm, administratrix of the estate of John Hamm, deceased, by their attorney, J. Arthur Moran, of Delavan, Wisconsin, respectfully move the court for an order dispensing with the printing of the record pursuant to Rule 38, and in the alternative for an order limiting the parts of the record to be printed upon the following grounds and for the following reasons:

1.

Petitioners have in good faith attempted to stipulate with respondent limiting the printing of the record by the omission of unnecessary parts not material to any issues raised upon this petition for certiorari and respondent has refused to so stipulate.

2.

That annexed hereto and incorporated herein and marked Exhibit "A" is the notice and proposed stipulation served upon respondent.

3.

That annexed hereto and marked Exhibit "B" is the designated portions of the record material to the questions raised upon this petition for certiorari.

Dated this 4th day of February, 1948.

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,
606—56th Street, Kenosha, Wisconsin.

Exhibit 'A'"

SUPREME COURT OF UNITED STATES

October, 1947, term

No. .....

GEORGE M. ILLGES and LOUISE HAMM,
Administratrix of the estate of
John Hamm, deceased,

Petitioners,

vs.

J. E. CONGDON, JR.,

Respondent.

Stipulation.

It Is Hereby Stipulated and Agreed, by and between the parties to the above entitled proceeding, by and through their respective attorneys, that the clerk shall print those portions of the record returned to this court pursuant to

praecipe identified and described in designation of the portions of the record to be printed served upon respondent on the 21st day of January, 1948.

J. ARTHUR MORAN
Attorney of Record
Delavan, Wisconsin

CAVANAGH, STEPHENSON, MITTELSTAED
& SHELDON
Of Counsel

By .....WM. A. SHELDON.....
Attorneys for Petitioners

GODFREY & PFEIL
Attorneys for Respondent

By .....

SUPREME COURT OF UNITED STATES

October, 1947, term

No. .....

GEORGE M. ILLGES and LOUISE HAMM,
Administratrix of the estate of
John Hamm, deceased,

Petitioners,

vs.

J. E. CONGDON, JR.,

Respondent.

Notice of proposed stipulation.

TO: GODFREY & PFEIL
Attorneys for Respondent
Elkhorn, Wisconsin

You Are Hereby Notified that the undersigned, pursuant to Rule 38 (8) of the Rules of the Supreme Court of the United States, propose that the designation of the parts of the record to be printed served upon you on the 21st day of January, 1948, be stipulated upon as the portions of the record to be printed by the clerk of the supreme court.

You Are Further Notified that this proposal is based upon the petition for the manuscript copy of the petition and supporting brief served upon you on the 21st day of January, 1948.

You Are Further Notified that the designation of the portions of the record to be printed heretofore referred to contains the only material parts of the record necessary to a consideration of the questions presented by the petition for writ of certiorari.

That annexed hereto is a proposed stipulation.

You Are Further Notified that in default of stipulation, then and in that event, petitioners by and through their respective attorneys will move the court for an order taxing costs against respondent for the printing of the unnecessary parts of the record, together with such other order as may in the matter be proper.

Dated this 26th day of January, 1948.

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,
Kenosha, Wisconsin

Exhibit "B"

SUPREME COURT OF UNITED STATES

October, 1947, term

No. .....

GEORGE M. ILLGES and LOUISE HAMM,
Administratrix of the estate of
John Hamm, deceased,

Petitioners,

vs.

J. E. CONGDON, JR.,

Respondent.

Designation of portions of the record to be printed pursuant to Rules 38 and 13 of the Rules of the Supreme Court.

J. ARTHUR MORAN
Attorney for Petitioners
Delavan, Wisconsin

CAVANAGH, STEPHENSON, MITTELSTAED
& SHELDON
Of Counsel
Kenosha, Wisconsin

Designation of parts of the record to be printed.

Now comes the petitioners above named, and respectfully request that the clerk print the following portions of the record for determination of the issues presented by the petition for certiorari pursuant to rule 13, paragraph 9 of the Rules of the Supreme Court:

1. Complaint of George M. Illges—R. 2 to 5
   Print the following paragraphs thereof: 6, 7, 8, and 9, including the wherefore clause.

2. Answer and counterclaim of J. E. Congdon, Jr.—R. 9 to 19.
   Print the following pa[illegible]ereof: 12, 20, 30, 33, 34, 35, and the [illegible]se.

3. Reply to George M. Illges [illegible]
   Print the following pa[illegible]r[illegible]: 7, 8, 9, 10.

4. Cross-complaint of defendant, J. E. Congdon, Jr. against John Hamm—R. 30 to 34.
   Print the following paragraphs thereof: 8, 11, 12, and the wherefore clause.

5. Answer and cross-complaint of John Hamm against J. E. Congdon, Jr.—R. 45 to 52.
   Print the following paragraphs thereof: 10, 12, 13, 14, 16, 17, and the wherefore clause.

5a. Cross-complaint of John Hamm against J. E. Congdon, Jr. R. 48 et seq.
   Print the following paragraphs thereof: 9 and 10.

6. Answer of J. E. Congdon, Jr. to cross-complaint of John Hamm—R. 57 to 61.

Print the following paragraphs thereof: 12 and 13.

7. Amended complaint of George M. Illges—R. 64 to 68.
   Print the following paragraphs thereof: 7, 8, and the wherefore clause.

8. Amended answer of J. E. Congdon, Jr. to amended complaint R. 72 to 92.
   Print the following paragraphs thereof: 6, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 46, 47, 50, 54, and the wherefore clause.

9. Reply to George M. Illges to amended answer and counterclaim of J. E. Congdon, Jr.—R. 97 to 101.
   Print the following paragraphs thereof: 1, 7, 15, 16, 18, 19, 20, and 21.

10. Decision of the trial court after trial of case—R. 103 to 116.
    Print all.

11. Supplemental decision and order denying motion for rehearing—R. 123 to 125.
    Print all.

12. Findings of fact and conclusions of law of trial court—R. 127 to 134.
    Print all.

13. Original judgment of trial court—R. 136 to 138.
    Print the following paragraphs thereof: 4 and 5.

14. Notice of appeal of J. E. Congdon, Jr. to the Supreme Court of the State of Wisconsin—R. 145.
    Print all.

15. Decision of the Supreme Court of State of Wisconsin.—R. ....., 248 Wis. 85.
    Print all.

16. Supplemental decision on motion for rehearing of Supreme Court—R. ....., 248 Wis. 85.
    Print all.

17. Decision of trial court after remand of record—R. 955 to 963.
    Print all.

18. Supplemental findings of fact and conclusions of law after remand of the record—R. 965 to 974.
    Print all.

19. Judgment—R. 999 to 1009.
    Print the following thereof:
    Record page 999, omitting caption;
    Record page 1000;
    Record page 1001 to first finding of fact following the words: "It is ordered, found, adjudged, and determined as follows:"

    Then print the following paragraphs thereof: 4, 13, 14, 15 and 16.

20. Notice of appeal by J. E. Congdon, Jr. to the Supreme Court (second appeal).—R. 1053.
    Print all.

21. Notice of motion for review by George M. Illges and Louise Hamm, administratrix of the estate of John Hamm, deceased.—R. .....
    Print all.

22. Decision of Supreme Court on second appeal—R. ....., 251 Wis. 50.
    Print all.

23. Order of trial court of November 3, 1947, amending findings and judgment—R. ..... .
Print all.

24. Order of trial court of November 14, 1947, authorizing disbursal and execution.—R. ..... .
Print all.

25. Print the following portions of the bill of exceptions:

Testimony of George M. Illges:

(a) R. page 190, begin 10th line from top of page to R. page 201, 8th line from bottom of page.

(b) R. page 202, begin 10th line from the bottom of the page to R. page 203, 5th line from the bottom of the page.

(c) R. page 216, begin 13th line from the top of the page to R. page 218, 13th line from the bottom of the page.

(d) R. page 240, begin 12th line from the top of the page to R. page 241, 5th line from the top of the page.

(e) R. page 252, begin last line to R. page 253, 16th line from top of the page.

(f) R. page 255, begin 15th line from the bottom of the page to bottom of page R. 255.

(g) R. page 296, begin 11th line from the top of the page to R. page 297 to 16th line at top of the page.

(h) R. page 298, begin 15th line from top of page to 4th line from bottom of page.

(i) R. page 497, begin top of page to R. page 498 to 3rd line from top of page.

(j) R. page 819, begin top of page, to R. page 820 bottom of page.

(k) R. page 823, begin 5th line from bottom of page to R. page 825 bottom of page.

(l) R. page 836, begin 6th line from bottom of the page to R. 837 to 7th line from top of page.

Testimony of John Hamm:

(m) R. page 444, begin 6th line from the bottom of the page to R. page 449, 17th line from the bottom of the page.

(n) R. page 455, begin 5th line from the top of the page to R. page 456, to 10th line from the bottom of the page.

Testimony of J. E. Congdon, Jr.:

(o) R. page 567, begin 3rd line from the top of the page to R. page 571, 4th line from the top of the page.

(p) R. page 571, begin 16th line from the bottom of the page to R. page 572, 14th line from the bottom of the page.

(q) R. page 578, begin 15th line from the top of page to R. page 581 to 7th line from the top of the page.

(r) R. page 609, begin 9th line from top of the page to R. page 614 to 8th line from the bottom of the page.

(s) R. page 615, begin 2nd line to R. page 615, 4th line from the bottom of the page.

(t) R. page 616, begin 7th line from top of the page to 617 to 6th line from top of the page.

(u) R. page 624, begin 2nd line from bottom of page to R. page 626 to 6th line from the top of the page.

(v) R. page 631, begin 15th line from bottom of page to R. page 636, 6th line from the bottom of the page.

(w) R. page 638, begin 10th line from top of page to R. page 638, 7th line from the bottom of the page.

(x) R. page 642, begin 3rd line from top of the page to R. page 643 to 10th line from top of the page.

(y) R. page 645, begin 12th line from bottom of the page to R. page 646 to end of page.

26. Exhibit 47, R. page ..... .
Print all.

Service admitted this 21st day of January, 1948.

Godfrey, Pfeil & Godfrey,

Attorneys for J. E. Congdon, Jr.,

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,
606 56th Street, Kenosha, Wisconsin.

ARGUMENT ON MOTION.

The issues raised upon this petition for certiorari do not require the examination or consideration of the entire record. The greater number of pages of the record and exhibits received and considered by the court relate to the accounting, the history of the creation of the contract and are in no way germane to any issue before the court for consideration on this petition. To require printing of the entire record would impose an unnecessary burden upon the court to examine hundreds of pages of immaterial and unnecessary matter. It would likewise impose excessive and burdensome expense upon petitioners to pay for the printing of a record only a small part of which is necessary to the consideration of the issues here raised. Petitioners have made a sincere effort in accordance with Rule 38 (8) of Rules of the Supreme Court in person and by preparing and offering to stipulate and by designating the portions of the record considered by petitioners necessary to the proper analysis of the issues here presented. Respondent has neither stipulated nor indicated any willingness to stipulate. Neither has he suggested any additional portions of record which he considers material.

We, therefore, respectfully request that the motion be granted either dispensing with the printing of the record as a preliminary step or limiting the record to be printed as designated in Exhibit "B" heretofore appearing.

Respectfully submitted,

J. ARTHUR MORAN,
Attorney for Petitioners,
Delavan, Wisconsin.

CAVANAGH, STEPHENSON,
MITTELSTAED & SHELDON,
Of Counsel,
606 56th Street, Kenosha, Wisconsin.

[illegible]

GEORGE H. [illegible]
trix of the Estate of John [illegible]

vs.

J. E. CONGDON, Jr.,

[illegible]

Brief of Respondent in [illegible]
for Writ of Certiorari to [illegible]
worth County, Wisconsin.

Motion to Return Original Record.

Argument on Motions.

ARTHUR J. THO[illegible],
Counsel for Respondent,
Elkhorn, Wisconsin.

SUBJECT INDEX.

AUTHORITIES.

Cases Cited:

Authorities Cited—*Continued.*

In The

SUPREME COURT OF THE UNITED STATES

October, 1947, Term.

No. 606

GEORGE M. ILLGES and LOUISE HAMM, Administratrix of the Estate of John Hamm, Deceased,

Petitioners,

vs.

J. E. CONGDON, Jr.,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to Review State Court Judgment.

This is an application for a writ of certiorari directed to the Circuit Court of Walworth County, Wisconsin, to review a judgment of that Court entered November 3, 1947.

The Circuit Court is a trial court of general jurisdiction. The Supreme Court is an appellate court and the highest court of the state.

The judgment if the Circuit Court was entered following the decision of the Supreme Court of Wisconsin filed June 10, 1947, which modified and affirmed a previous judgment of the trial court.

Statement of the Case.

This was an action for damages for breach of contract brought by Petitioner, George M. Illges, in the Circuit Court for Walworth County against the respondent, J. E. Congdon, Jr. John Hamm was interpleaded as a defendant. He died during the course of the trial and the petitioner, Louise Hamm, was substituted as administratrix of his estate.

The action involved a contract for the cutting of timber. The respondent, J. E. Congdon, Jr., owned the timber. Hamm was to cut and process the same and Illges was to do the selling and furnish the finances.

As a result of the first trial a judgment was entered February 20, 1945, adjudging that respondent Congdon had breached the contract and awarding damages to petitioners Illges and Hamm.

On appeal this judgment was reversed by the Supreme Court of Wisconsin on December 4, 1945. This case is reported in 248 Wis. 85. By this decision the Supreme Court ruled that the contract had been breached by Illges and Hamm and remanded the cause to the trial court for further proceedings in accordance with its opinion.

Further proceedings were had in the trial court and the trial court made new and additional findings of fact and conclusions of law and entered judgment thereon.

Thereafter the respondent Congdon appealed to the Supreme Court and the petitioners Illges and Hamm pursuant to state statute sought a review of various questions adjudicated by the trial court deemed to be adverse to them.

The Supreme Court by decision filed June 10, 1947, and reported in 251 Wis. 50, 27 N. W. Reporter 2nd, 716 modified the judgment of the trial court, and affirmed the same as so modified. The case was then remanded to the trial court and further proceedings were had resulting in

a final judgment dated November 3, 1947 (R. 1210), which judgment is sought to be reviewed in this court by this petition. Thereafter judgments were docketed in favor of petitioners against respondent, the judgments have been paid and have been satisfied pursuant to State Law. (R. 1227)

Attention is called to a collateral proceeding not here involved, wherein the petitioner Illges sought by an original mandamus proceeding in the Supreme Court of Wisconsin to compel the trial judge to enter a judgment following the first decision by the State Supreme Court, different than that entered by the trial court. This case is entitled *State ex rel. Illges vs. Kopp* and was decided February 25, 1947, and is reported in 250 Wis. 32.

The Court there determined that the issues determined by the Circuit Court in the course of subsequent proceedings after filing of the mandate by the Supreme Court following the first appeal could not be reviewed or modified by mandamus, and that such matters could only be considered on a second appeal. It also determined that relator's contention regarding Supreme Court consideration of evidence, raised no question under either the State or Federal Constitution.

Statement as to Jurisdiction.

Petitioners' application for writ of certiorari is pursuant to Section 237(b) of the Judicial Code as amended, 28 U. S. C. A. 344(b). No state statute is involved and the application is predicated on that clause of the Judicial Code providing, "or where any title, right, privilege, or immunity is specially set up or claimed by either party, under the constitution, or under any treaty or statute

of, or commission held or authority exercised under the United States; * * * "

It is to be noted that the application is not directed to the final judgment of the Supreme Court of Wisconsin filed June 10, 1947, but rather to the judgment of the Circuit Court for Walworth County entered November 3, 1947, and which it is claimed became final November 14, 1947. It is the claim of petitioners that the modifications of the judgment of the Supreme Court dated June 10, 1947, were not of a ministerial nature but rather required the exercise of judicial functions and hence that a final judgment was not entered until November 3, 1947.

No appeal was taken by the petitioners or the respondent from the judgment of the Circuit Court entered November 3, 1947.

Questions Involved.

Questions involved are:

1. Did the Supreme Court of Wisconsin make findings of fact in excess of its power?
2. If so, did this result in taking petitioners' property without due process of law in violation of Federal Constitution?
3. Was any right, privilege or immunity "specially set up or claimed" by either party under the Federal Constitution or under any treaty or statute thereof?
4. Is the judgment of the Circuit Court for Walworth County entered November 3, 1947, a final judgment or decree of the highest court of the state?

5. Does the petition present a substantial Federal question?

Summary of Argument.

1.

The Wisconsin Supreme Court did not make findings of fact. The Court merely held, contrary to the conclusions of the trial court, that the admitted breaches of the contract found by the trial court, were important and went to the heart of the contract and entitled respondent to terminate the same.

2.

Even if the Supreme Court of Wisconsin did make findings of fact in excess of its power this would be a violation of the State Constitution and a state statute and is a matter of local concern and would not raise any Federal question.

3.

Petitioner has not "specially set up or claimed" any title, right, privilege or immunity and the petition is devoid of any such showing. This is a statutory requirement for jurisdiction of this court and without it petition should be denied.

4.

The judgment of the Circuit Court for Walworth County is not a final judgment or decree of the highest court of the state. The petitioner contends that on remittitur from the Supreme Court on the second appeal that judicial

functions were required to be exercised by the trial court to comply with the Supreme Court's decision modifying the trial court's former decree and that the function of the trial court required judicial discretion and was not ministerial. If so, then an appeal would again lie to the Supreme Court and therefore the decision here in question is not a decision of the highest court of the state.

If, on the contrary, the functions to be performed by the trial court were ministerial in character, then this petition comes too late since it should have been filed within 90 days from June 10, 1947, the date of the Supreme Court decision.

5.

No substantial Federal question is presented by the record.

(a).

No Federal question was passed on.

The only place where the record discloses an attempt to raise a Federal question was in a collateral original proceeding in mandamus in the State Supreme Court which is not a part of this record. Even in that case the court held relator raised no constitutional question and that he had mistaken his remedy.

(b).

The question at best is one of State Court procedure which does not raise a Federal question.

(c).

The question is one of local law and raises no Federal question.

(d).

The question involved is one of fact and raises no Federal question.

(e).

The judgment sought to be reviewed has been paid and satisfied and the case is closed and the question is moot.

Argument.

1.

The Supreme Court of Wisconsin did not make findings of fact.

Petitioners based their whole claim upon the proposition that the Supreme Court of Wisconsin is an appellate court without power under the State Constitution to make findings of fact and that it did so in violation thereof, resulting in a reversal of the trial court judgment on the first appeal.

It is true that the Supreme Court of Wisconsin, so far as is here material, is a court of review only, under Article 7, Section 3 of the Wisconsin Constitution, and under Section 251.08 of the Wisconsin Statutes.

It is not true that the Supreme Court made findings of fact.

The findings of fact alleged to have been made by the Supreme Court of Wisconsin by the petitioners are contained in the decision on the first appeal, *Illges vs. Congdon*, 248 Wis. 85, decided December 4, 1945.

The trial court had held in its fourth findings of fact set forth in full on pages 91 and 92 of that decision, that a contract existed between the petitioners and respondent in connection with a logging venture, and that the

respondent had breached the contract. The trial court had held that the disputes over the conduct of the operation and various alleged breaches of the contract by petitioners did not go to the heart of the contract and was purely a question of accounting.

On the appeal the Supreme Court of Wisconsin determined that various breaches of the contract by the petitioners did go to the heart of the contract and was a basis for the cancellation of the contract by the respondent Congdon, and the decision of the trial court was reversed and the cause remanded for further proceedings.

The facts which led the Supreme Court to this decision were not in dispute.

The Supreme Court in its decision says:

> "Under the terms of the contract as found by the trial court, there were no expenses for which Illges was entitled to reimbursement from the proceeds of the lumber sold. Paragraph 6(a) of the findings refers especially to dry-kiln installation, which they agreed not to install, or to expenses other than the cost of production or sale. As the lumber was sold, Congdon was to receive $15 per thousand board feet, which was the first money to be paid from receipts. In place of Congdon's receiving this money, it was used for expenses of operation by Hamm and Illges. Likewise Congdon was to receive one-half of the slabs, which it appears he intended to use for firewood. Hamm, in violation of the contract, sold the slab wood and converted the money to his own use for operating expense. Hamm paid to himself seventy-five cents per hour, contrary to the terms of the contract as found by the court. This was a joint enterprise and no one had any right to appropriate the receipts to his own use. The only way the purpose

of the contract could be carried out was for the receipts to be placed in a general fund and disbursed in accordance with the terms of the contract, which was $15 per thousand board feet to Congdon for timber, and $30 per thousand board feet to Illges and Hamm thereafter for the expense of logging, manufacture of lumber, and sale of the lumber, any balance to be paid one-third to each. It was the duty of Hamm and Illges to arrange their own finances if any additional money was needed. This money was to be provided by Illges and not from the joint funds. Payments were due to Congdon immediately when the lumber was sold and money received in payment for it."

The Court further says:

"To permit respondents to carry on under what was in effect the making of a new contract and disburse all of the receipts for their own purpose would be such a breach so substantial as to defeat the very object of the contract * * * The conduct of respondents was not a technical or unimportant breach or failure of performance due to mere inadvertence, but was an attempt on the part of respondents to enforce the terms of a new contract which had never been agreed to or entered into between the parties. It was a deliberate violation of the terms of the contract and respondents, by their conduct, renunciated the contract as found by the court."

Illges vs. Congdon, 248 Wis. 85.

It is also to be noted that the Court points out in its opinion that petitioners first pleaded one contract and thereafter served an amended complaint alleging an entirely different contract.

Surely if an appellate court is to have any supervision by a review of a trial court it must have the power to determine whether the findings of the lower court and the admitted facts warrant the conclusion reached by the trial court, and as to whether those facts and alleged breaches go to the heart of the contract or are merely incidental to a question of accounting and unimportant.

There is no dispute that as the lumber was sold Congdon was to receive $15 per thousand from the first receipts, and there is no dispute that in place of Congdon receiving this money it was used for expenses of operation by Hamm and Illges. The contract as found by the trial court provided that Congdon was to receive one-half of the slabs. There is no dispute that Hamm in violation of contract sold the slab wood and converted the money to his own use for operating expense. There is no dispute that Hamm paid himself seventy-five cents per hour contrary to the terms of the contract as found by the trial court. The contract was breached in other respects by Hamm and Illges, but the trial court was of the view that they were not so important or material as to permit Congdon to cancel the contract. The Supreme Court held the legal effect to be otherwise.

This does not constitute a finding of fact by the Supreme Court. The entire premise upon which petitioners base their case is therefore false.

Furthermore we point out that the trial court did in fact make different and additional findings of fact and conclusions of law following remittitur after the first appeal. See pages 6 and 7 of petition. That these findings were made as a result of suggestions or directions by the Supreme Court is quite immaterial. The fact is that they were made and that they are findings of the trial court. The findings do support the judgment that was entered and petitioner is in no position to claim that there are no

findings or admitted facts to support the second judgment of the trial court. The argument that the Supreme Court made the findings of fact is therefore untenable.

2.

Even if the Supreme Court of Wisconsin did make findings of fact in excess of its power this would be a violation of the State Constitution and would not raise any Federal question.

It is important to bear in mind that there is no state statute or section of the State Constitution which petitioners claim to be invalid. It is merely their contention that the act of the Supreme Court has been such as to violate the state statute or the State Constitution.

As to questions under a state statute pertaining to procedure or as to the jurisdiction of a state court, that is to say, whether or not it has appellate or original jurisdiction, the decision of the State Supreme Court is final and no Federal question is involved.

> "Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court has no jurisdiction. *Commercial Bank vs. Buckingham* (Ohio, 1847), 5 How. 317, 12 L. Ed. 169; *Scott vs. Jones* (Mich., 1847), 5 How. 343, 12 L. Ed. 181; *Smith vs. Hunter* (Ohio, 1849), 7 How. 738, 12 L. Ed. 894; *Lessieur vs. Price* (Mo., 1851), 12 How. 59, 13 L. Ed. 893; *Congdon, etc., Min. Co. vs. Goodman* (Tenn., 1862), 2 Black, 574, 17 L. Ed. 257."

> "A decision of the state court resting upon the construction and not upon the validity of a statute of the state does not present a federal question.

Grand Gulf R., etc., Co. vs. Marshall (La., 1851), 12 How. 165, 13 L. Ed. 938; *Ferry vs. King County* (Wash., 1891), 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895; *Snell vs. Chicago* (Ill., 1894), 152 U. S. 191, 14 S. Ct. 489, 38 L. Ed. 408."

Likewise as to whether or not the State Constitution has been violated by the Supreme Court in determining a matter of its jurisdiction or whether that jurisdiction has been properly exercised is likewise a matter for final determination by the State Court and no Federal question is involved.

For instance, in some respects the Supreme Court of Wisconsin does have original jurisdiction. Whether that jurisdiction has been properly exercised is purely a State Court matter. Again in several states the Supreme Courts do have power to make findings of fact and conclusions of law, or in other words, exercise original jurisdiction. This is no concern of the Federal government and raises no question under the Federal Constitution.

3.

No title, right, privilege or immunity is set up or claimed.

This Court's jurisdiction is statutory and petitioners must qualify under Section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b). They can only hope to qualify under the clause pertaining to the title, right, privilege or immunity under the Federal Constitution or any treaty or statute or commission. To do so the right or privilege must be "specially set up or claimed."

Nowhere in the pleadings is this alleged right or privilege specially set up or claimed. Nowhere does it appear

in the petition that the question was raised in either the trial court or in the Supreme Court. The only statement that the question was ever raised is contained in an unsupported statement in counsel's brief which is not a part of the petition.

In this regard it is important to bear in mind that the decision of the Wisconsin Supreme Court on the mandamus action where counsel for petitioner sought to raise the question here intended for review, *State ex rel. Illges vs. Kopp,* 250 Wis. 32 decided February 25, 1947, is not a part of the record or in any way involved in this case. That was an original proceeding in the Supreme Court, is collateral to this action, and the record is in that court, and is not a part of the record in this case. In this connection we call attention to the fact that petitioners have failed to comply with paragraph 1 of Rule 12 of this Court in that they have failed to specify the stage in the proceedings in the court of first instance, and in the appellate court, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them and the way in which they were passed upon by the court with specific reference to the places and the record where the matter appears as will support the assertion that the rulings raised a Federal question. Nowhere in the petition do we find such information.

4.

The judgment of the Circuit Court for Walworth County is not a final judgment or decree of the highest Court of the State.

The decision by the Supreme Court of Wisconsin on the second appeal was made June 10, 1947, *Illges vs. Congdon,* 251 Wis. 50, 27 N. W. 2nd 716. This decision modified

the trial court's second judgment and affirmed the judgment as so modified and the case was remanded for further proceedings. Petitioners in their brief at page 26 state:

> "The second appeal modified the judgment and required substantial reconsideration and modifications to the findings of fact, conclusions of law and judgment previously entered. These modifications were not of a ministerial nature. The rights of the parties to the assets of the joint enterprise had not been determined finally and completely pursuant to the mandate of the court from the first appeal. In lieu of nominal damages allowed to the respondent in the judgment as entered, no damages were allowed in the final judgment. After sale of the assets, the court reserved the right and power on motion to determine the several amounts due the several parties. In the order amending the judgment dated November 3, 1947 (R. 1210), the court expressly reserved and precluded the issuance of execution until the further order of the court. These functions are judicial in nature requiring judicial discretion, judgment and power and not ministerial acts of a purely clerical nature."

If petitioners be correct in this statement, and if the trial court thereafter performed various judicial functions, which it unquestionably did, then this decision was not a final decision for an appeal from the decision of the trial court resulting from the performance of these judicial functions would lie to the Wisconsin Supreme Court. It is immaterial that the Wisconsin Supreme Court would undoubtedly affirm on the basis of previous decisions. Petitioners would be obliged to take that appeal in order to have the decision of the highest court of the state so as

to meet the statutory requirement for the jurisdiction of this court.

Great Western Tel. vs. Burnham, 162 U. S. 339, 16 S. Ct. 850, 40 L. Ed. 991.

If, on the other hand, the duties to be performed by the trial court after the decision by the Supreme Court on the second appeal, were ministerial in nature only, then this petition comes too late, since it should have been filed under the statute within 90 days from June 10, 1947.

Such appears to be the dilemma facing petitioners on their own statement.

5.

No substantial Federal question is presented by the Record.

In addition to the reasons heretofore advanced it is submitted that for several reasons no substantial Federal question is presented and that the matter is of purely state concern.

(a)

Federal Question Not Passed on.

An examination of both decisions of the Wisconsin Supreme Court on the appeals involving the matter here at issue, *Illges vs. Congdon,* 248 Wis. 85 and *Illges vs. Congdon,* 251 Wis. 50, 27 N. W. 2nd 716, fails to disclose that any Federal question was discussed or passed on, nor that any such question was presented, nor that the judgment could not have been given without deciding such Federal question.

This is a jurisdictional requirement in this court. See numerous cases cited in Note 49, Title 28 U. S. C. A., page 231, under paragraph 344, Section 237 of the Judicial Code, as amended. In this connection we call the Court's attention to the fact that it is only in the collateral proceeding in the mandamus action where petitioner sought to raise this Federal question. That was an original proceeding in State Supreme Court to compel the trial court to enter a judgment different than that entered by the trial court following the first decision by the State Supreme Court. This case was decided February 25, 1947 and is entitled *State ex rel Illges vs. Kopp* and is reported in 250 Wis. 32.

That decision is not a part of this record and it was there decided that not only did the relator raise no constitutional question, but that he had mistaken his remedy.

(b)

Question of State Procedure Does Not Raise Federal Question.

Petitioners contend that the Supreme Court of Wisconsin made findings of fact. If we assume for the purposes of argument that this be true, it at most involves a question of procedure. A decision of a state court resting on grounds of state procedure does not present a Federal question. See numerous cases cited in Note 81 to paragraph 344 under Section 237 of the Judicial Code as amended, 28 U. S. C. A., page 251.

(c)

Question Is One of Local Law and Raises No Federal Question.

The decisions here involved determine laws of the State of Wisconsin applicable to a state of facts pertaining to

a contract. Such decisions of state courts based on local laws not involving constitutional questions are not subject to review by this court.

See Note 71 to paragraph 344 under Section 237 of the Judicial Code as amended, 28 U. S. C. A., page 242.

(d)

Question Involved Is One of Fact and Raises No Federal Question.

The decision by the Supreme Court of Wisconsin involved a question of fact and the law applicable thereto. The facts which the Supreme Court used as a basis for determining that the contract had been breached by petitioners and that respondent had a right to terminate the same were not in dispute. Among other things it was not disputed (1) that in place of paying Congdon from the first receipts $15 per thousand board feet that this money was used for expenses of operation by Hamm and Illges; (2) that Congdon was to receive one-half of the slabs, but that Hamm sold the slab wood and converted the money for his own use for operating expense, and (3) that Hamm paid himself seventy-five cents per hour contrary to the terms of the contract as found by the trial court.

These are questions with which this court does not concern itself as this court does not grant certiorari to review evidence and to discuss specific facts.

U. S. vs. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

(e)

Judgment Sought to Be Reviewed Has Been Paid and Satisfied and Case Is Closed.

The judgment entered by the Circuit Court for Walworth County on November 3, 1947, provided for the payment of certain sums by respondent to petitioners. (R. 1203 and 1211) These amounts have been paid to petitioners and the judgment has been satisfied pursuant to state law. (R. 1220, 1224 and 1227) It is the contention of respondent that acceptance of the benefit of the judgment by petitioners, even if with reservations, and the satisfaction of that judgment by the Clerk pursuant to Section 270.93, Wisconsin Statutes, terminated this litigation and leaves questions to be decided on this application moot.

Conclusion.

We call attention to the fact that petitioners' complaint is against the ruling of the first decision of the Wisconsin Supreme Court reported in 248 Wis. 85 and decided December 4, 1945. The petition is not to review that decision. The trial court following that decision did make findings of fact and conclusions of law which do support the judgment as finally entered and these findings are based upon the evidence and upon the pleadings and the admitted facts. Petitioners first pleaded one contract and then by an amended complaint pleaded an entirely different contract. The contract as found by the trial court was breached in several respects by petitioners which the trial court first concluded "that none of the reasons assigned by the respondent in justification of his termination of the contract went to the heart of the contract

or constituted a material breach thereof by petitioners." (See page 4 of petition, and 248 Wis. 85 at page 93.) The Supreme Court decided that the breach by petitioners was wilful, important and went to the heart of the contract and warranted Congdon in terminating the same. See *Illges vs. Congdon,* 248 Wis. 85 at 95a. This is purely a question of law and a matter of interpretation which is singularly within the province of the State Court.

For the reason that petitioners' major premise, namely, that the Supreme Court of Wisconsin made findings of fact in excess of its powers, is wrong and that even if correct, no Federal question is raised, because the record does not show that petitioners "specially set up or claimed" the right sought to be reviewed, because either the judgment is not that of the highest court of the state or the application is not timely, and because no substantial Federal question is raised, and for the reasons heretofore urged respondent submits that the application for the writ of certiorari should be denied.

Respectfully submitted,

ARTHUR T. THORSON,
Counsel for Respondent,
Elkhorn, Wisconsin.

Motion of Respondent to Return Original Record to Circuit Court of Walworth County, Wisconsin.

Now comes the respondent and upon the annexed affidavit of Arthur T. Thorson and upon the records and files herein moves the Court to return the original record to the Clerk of the Circuit Court of Walworth County, Wisconsin, with leave to the appellant to cause a transcript thereof to be certified by said clerk and filed with this Court.

Argument on Motion.

By mistake, the Clerk of the Circuit Court for Walworth County, Wisconsin, by direction of one of the counsel for petitioners, forwarded to this Court the original record rather than a transcript thereof as required by the rules.

Respondent's present counsel did not represent him in the trial court and it is necessary that he have access to the original record to be able to prepare a defense to this petition. He is not able to determine whether petitioners' designation of parts of the record to be printed are adequate.

The respondent has, therefore, moved that the original record be returned with leave to petitioners to cause a transcript thereof to be certified by the Clerk and filed with this Court. That respondent urges consideration of this motion only in the event that the application for the writ is not denied upon its merits.

Argument on Motion of Petitioners to Dispense With Printing Record or Alternative to Limit Parts to Be Printed.

For the reasons immediately previously stated with respect to the motion to return the original record we must oppose petitioners' application to dispense with printing of the record in the event that the petition for the writ be not denied upon its merits.

Without a printed record counsel for respondent is unable to prepare a defense to the petition.

It is obvious that a large part of the record deals with extraneous matters and need not be printed, and the respondent is willing to cooperate with the petitioners to determine by stipulation the portions to be printed, but without access to the original record is not able to determine whether the parts of the record suggested to be printed by the petitioner are adequate.

At the very minimum the parts of the record designated by the petitioner to be printed should be printed. This also is urged only in the event that the petition for the writ is not denied on its merits.

Respectfully submitted,

ARTHUR T. THORSON,
Counsel for Respondent,
Elkhorn, Wisconsin.